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6 Attorneys for Defendants
7 SELECT BRANDS, INC. and
TARGET CORPORATION



2/7/2011

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

17 This Administrative Uncontested Motion is brought pursuant to Local Rule 7-11, seeking
18 an order allowing defendants to conduct the deposition of Theodore Martinez, a third-party
19 witness, who was first identified by plaintiff on January 21, 2011, after the discovery cut-off date.
20 Defendants TARGET CORPORATION and SELECT BRANDS, INC. contend there is good
21 cause to allow the taking of this deposition after the discovery cut-off date as set forth below:

22 This is a personal injury lawsuit based on claims for strict product liability and negligence.
23 The product at issue is a Chefmate model BL-10 blender, an ordinary blender sold exclusively by
24 TARGET CORPORATION and distributed by SELECT BRANDS, INC. Plaintiff THOMAS
25 SPILSBURY, JR. seeks compensatory and exemplary damages. Plaintiff alleges in his complaint
26 that on September 30, 2008, a Chefmate blender model BL-10 caused the injuries complained of in
27 this action.

ADMINISTRATIVE UNCONTESTED MOTION FOR AN ORDER ALLOWING DEFENDANTS TO
CONDUCT THE DEPOSITION OF THEODORE MARTINEZ, A NEWLY IDENTIFIED WITNESS, AFTER
DISCOVERY CUT-OFF DATE

1 On May 12, 2010, this court issued a Scheduling Order, which designated a discovery
2 cutoff date of January 21, 2011.

3 During the discovery process, plaintiff produced the accident blender on two occasions, in
4 response to Defendants' Demand for Inspection and at Plaintiff's deposition. He also produced
5 photographs of "The Blender" that he claims caused his injuries in response to a Request for
6 Production of Documents.

7 On November 10, 2010, TARGET CORPORATION and SELECT BRANDS, INC filed a
8 Motion for Summary Judgment on the grounds that it is an impossibility for "The Blender" to have
9 caused Plaintiff's injuries as that blender with its revised design did not even exist until *after* the
10 subject accident. The blender produced by Plaintiff as the accident blender has design features that
11 were not incorporated into the BL-10 until October 2008, weeks after Plaintiff's accident.
12 Moreover, the date of manufacture on "The Blender" (stamped onto all Chefmate BL-10 blenders
13 on a power cord plug prong) showed that the blender was not even assembled until mid October
14 2008, almost three weeks *after* Plaintiff's accident. Plaintiff's opposition to the Motion for
15 Summary Judgment was due on January 25, 2011.

16 On January 20, 2011, plaintiff's counsel informed defense counsel that earlier that day, his
17 client had just given him newly discovered photographs of the accident scene.

18 On January 21, 2011, plaintiff's counsel emailed defense counsel the newly discovered
19 photographs, which were represented to depict plaintiff's dorm room with a Chefmate blender,
20 chocolate shake, and blood. Plaintiff's counsel advised the photographs had been taken by
21 Theodore Martinez, a "dorm buddy", shortly after the accident. On the same date, plaintiff's
22 counsel provided a Declaration from Plaintiff wherein he provided a new story: "Upon reflection,
23 I have determined that following the September 30, 2008, accident, I was provided with a blender
24 to use when I was home in the San Jose area. This blender was virtually identical to the Chefmate
25 blender that injured my hand. It is my belief that this is the blender I mistakenly delivered to my
26 attorney's office." (Docket #85)

1 The accident scene photographs were brand new evidence created by a previously
2 unidentified witness, and plaintiff provided a brand new story claiming he had accidentally
3 misidentified the accident blender. Upon receiving this information, Defendants determined their
4 Motion for Summary Judgment should be withdrawn without prejudice.

5 Plaintiff testified at his deposition that he was not aware of any witnesses to the accident,
6 and in response to defendant's Request for Production of Documents seeking photographs of
7 plaintiff's dorm room and of the blender, the photographs reportedly taken by Mr. Martinez were
8 not produced. Defendants had never been provided with the name Theodore Martinez until
9 January 21, 2011.

10 The parties engaged in a meet and confer regarding a potential date for the deposition of
11 Mr. Martinez, and the date of February 15, 2011 was agreed upon. Plaintiff's counsel has
12 stipulated that Defendants be permitted to depose Mr. Martinez (Stipulation attached hereto).
13 Additionally, Mr. Martinez was served with a deposition subpoena on January 29, 2011.

14 Defendants request leave to conduct the deposition of Mr. Martinez after the discovery cut-
15 off date in order to authenticate the newly produced photographs and to determine important
16 information about the taking of the subject photographs.

Respectfully submitted,

19 | January 31, 2011

By:

JULIET MACMILLIN LOMPA
Attorneys for Defendants

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7 SELECT BRANDS, INC. and
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8
UNITED STATES DISTRICT COURT
9
NORTHERN DISTRICT OF CALIFORNIA

10 THOMAS SPILSBURY, JR.) Case No.: CV 09 5955 JW
11 Plaintiff,)
12 vs.)
13)
14 TARGET CORPORATION, SELECT)
15 BRANDS, INC, and DOES 1-25, inclusive.)
16 Defendants.)
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IT IS HEREBY STIPULATED AND AGREED by the parties, by and through their
respective attorneys of record, that Defendants shall be permitted to conduct the deposition of
Theodore Martinez, a third-party witness identified by plaintiff for the first time on January 21,
2011, after the discovery cut-off date of January 21, 2011.

IT IS SO AGREED,

CORSIGLIA McMAHON & ALLARD, LLP

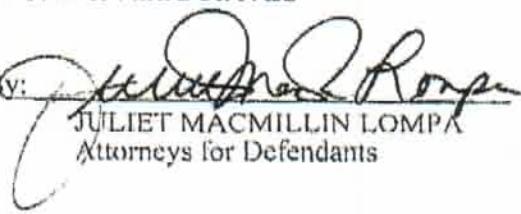
By:


TIMOTHY D. McMAHON
Attorneys for Plaintiff

IT IS SO AGREED,

STONE & ASSOCIATES

By:


JULIET MACMILLIN LOMPA
Attorneys for Defendants

STIPULATION AND ORDER RE: DEPOSITION OF THEODORE MARTINEZ, NEWLY IDENTIFIED
WITNESS, AFTER DISCOVERY CUT-OFF DATE

1 PURSUANT TO STIPULATION, IT IS SO ORDERED,
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4 Dated: February 7, 2011

5 By: James Ware
6 JAMES WARE, Chief Judge
7 UNITED STATES DISTRICT COURT
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**CERTIFICATE OF SERVICE
(28 U.S.C. §1746)**

I am employed in the County of Contra Costa, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2125 Ygnacio Valley Road, Suite 101, Walnut Creek, California 94598.

On the date indicated below, at the above-referenced business location, I transmitted the document(s) referenced below to the email address of the person designated, or by electronically filing the documents on the Court's ECF system **ADMINISTRATIVE UNCONTESTED MOTION FOR AN ORDER ALLOWING DEFENDANTS TO CONDUCT THE DEPOSITION OF THEODORE MARTINEZ, A NEWLY IDENTIFIED WITNESS, AFTER DISCOVERY CUT-OFF DATE:**

Timothy D. McMahon, Esq.
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I declare under penalty of perjury that the foregoing is true and correct. Executed at Walnut Creek, California on January 31, 2011.  

Celena Sepulveda